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No. 07-1401

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SUPREME COURT, U.S.

In The Supreme Court of the United States

WENDELL J. CALLAHAN, JR.
and
JEROME M. COUSAN,

Petitioners,

v.

CIRCUIT CITY STORES, INC.,

Respondent.

On Petition for Writ of Certiorari to the Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Corporate Disclosure Statement

Circuit City Stores, Inc is a publicly-traded corporation

Counterstatement of Jurisdiction

Contrary to the averments of the petitioners (Petition at 1), this case does not present an issue of federal law. Instead, the Louisiana First Circuit Court of Appeals concluded that this case is controlled by the decision of the Louisiana Supreme Court in *Kennedy v. Sheriff of East Baton Rouge*, 935 So.2d 669 (La. 2006). *Kennedy*, in turn, insofar as it is relevant to this case, adopted a knowing or reckless disregard standard for overcoming the qualified privilege attaching to reports of suspected criminal conduct made to the police.

In this garden variety false arrest/defamation case, the First and Third Questions Presented argue only that state law has been misapplied, arguments further developed in the body of the Petition. As such these questions do not properly invoke this Court's jurisdiction. The Second Question presented argues that the First Amendment analysis of the *Kennedy* court effects a violation of the Fourth Amendment. A close look at this question reveals that this is really a state law claim. Furthermore, this alleged federal issue is not pursued in the body of the Petition and must be deemed waived. In the body of the brief the Fourth Amendment is invoked only as a basis for distinguishing *Kennedy*'s application to the facts of this case. Furthermore, in adopting Restatement (Second) of Torts § 600 in *Kennedy*, the Louisiana Supreme Court assigned a number of policy reasons. One of them was "the desire to simplify and create consistency between constitutional law and state law definitions of fault and malice as respects the tort of defamation." 935

So.2d at 685. Because the state Supreme Court did not hold that its decision was constitutionally compelled under federal law, it decided no federal question, but merely assigned a motive for exercising its common law jurisdiction in the fashion it chose.

Finally, petitioners do not satisfy the requirements of Supreme Court Rule 14(g)(i), by showing both in the court of first instance and in the appellate courts where the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Petitioners assert only that they raised their Fourth Amendment concerns in their petition for rehearing *en banc* before the Louisiana Court of Appeals. (*See* Petition, at 5, citing A-32). This Court has generally refused to consider issues raised for the first time in a petition for rehearing when the state court is silent on the question. *Adams v. Robertson*, 520 U.S. 83, 89 n. 3 (1997). *Adams v. Robertson*, 520 U.S. at 86-89 sets out the burden on the petitioner to show that the question presented in this Court was properly raised and preserved in the courts below. The lack of such proper presentation here is no better illustrated than by contrasting the opening heading of the petitioner's argument "*Kennedy* is inapposite" (Petition, at 9) with the opinion of the Louisiana Court of Appeals (A-10 n. 3) observing that "neither party disputes that *Kennedy* is applicable to the present appeal."

Consequently, the petitioners have neither presented, nor demonstrated preservation of, a federal question, nor laid a proper foundation in this Court for review by certiorari. *See also* Rule 14.4 ("The Failure of a Petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a Petition.")

Reasons Why the Writ Should Be Denied

Petitioners present three questions for review. The first asks whether the appellate courts of Louisiana properly granted qualified immunity. This presents an issue entirely of state law. So also with the third question, which argues, based upon a Louisiana statute, that some rule other than that adopted by the Supreme Court of Louisiana in *Kennedy* should apply to the facts of this case.

The remaining question as stated by petitioners is whether it is a violation of the Fourth Amendment due process right to be free from unlawful arrest for a court to adopt a particular rule of qualified immunity motivated in part by First Amendment concerns.

In considering this question the Court should note that Rule 14(g) has not been satisfied; that the question is not developed in or even discussed by the courts below; the question is not argued substantively in the body of the brief but only as a basis for distinguishing state law; and the question does not present anything recognizable as a live issue in current legal thought. Fundamentally, the

issue presented is still an interpretation and application of state law. The issues in the case involve the scope of a state law defense to a state tort claim.

CONCLUSION

Because there is no federal issue presented in the case; because no federal issue has been shown to have been raised or preserved below; and because the only question which attempts to raise a federal claim raises no substantial, real, and live issue of federal constitutional law, there is no basis for this Court to exercise its *certiorari* jurisdiction, and the petition should be denied.

Respectfully Submitted,

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